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Peffer v. Stephens: Probable Cause, Searches and Seizures Within the Home, and Why Using Technology Should Not Open Your Front Door

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**PEFFER V. STEPHENS: PROBABLE CAUSE,
SEARCHES AND SEIZURES WITHIN THE
HOME, AND WHY USING TECHNOLOGY
SHOULD NOT OPEN YOUR
FRONT DOOR**

*By: Shane Landers**

ABSTRACT

The Fourth Amendment provides for the right of the people to be secure in their persons, houses, papers, and effects against unreasonable searches and seizures. Search warrants may only be issued upon a finding of probable cause. This core tenet of our constitutional republic becomes progressively flexible with every development in Fourth Amendment interpretation. In Peffer v. Stephens, the United States Court of Appeals for the Sixth Circuit delivered the latest blow to constitutional rights that restrict the State from engaging in unprincipled searches. In an issue of first impression, the Sixth Circuit held that a criminal defendant’s alleged use of a computer during the commission of a crime was adequate probable cause to justify a search of the defendant’s home and a seizure of the technological equipment inside. Such a shortsighted justification fails to consider technological innovation, economic policy, and historical civil liberties. Peffer v. Stephens is the latest proof of the parasitic relationship between the law and technological advancement. As technology evolves, the law struggles to keep pace and resultingly impedes economic development. With the exponential growth of technology in the 21st century, a visionary approach to search and seizure law is necessary to promote economic innovation and to refrain from further dismantling Fourth Amendment protections.

TABLE OF CONTENTS

I. INTRODUCTION.....	648
II. STANDARD FOR FOURTH AMENDMENT CLAIMS.....	650
A. What is a Search?	651
B. What is a Seizure of Property?	653
C. What Makes a Search Within the Home Unreasonable?	655
D. What Makes a Seizure of Property Unreasonable? ..	658
E. Probable Cause	660
III. PEFFER V. STEPHENS.....	662
A. Background	662
B. Holding and Reasoning	664
IV. ANALYSIS OF THE PEFFER RATIONALE	669

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A. Was the Affidavit Supported by Legally Sufficient Probable Cause?	669
B. Breadth of the Holding	674
C. Public, Economic, and Technological Policy	676
V. CONCLUSION: HOW SEARCH AND SEIZURE LAW SHOULD MOVE FORWARD	677

I. INTRODUCTION

“The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated”¹ The Fourth Amendment embodies this nation’s fundamental values of freedom, civil liberty, and personal identity. As the United States Supreme Court itself has stated, “[a]t the very core’ of the Fourth Amendment ‘stands the right of a man to retreat into his own home and there be free from unreasonable governmental intrusion.’”² Thus, the home is especially sacred because of the “occupants’ possessory interests in the premises” and their “privacy interests in the activities that take place within.”³

The Fourth Amendment was a direct result of what American colonists perceived as violations of their common-law rights. Historically, “British statutes appeared to give customs officials almost unlimited authority to search for and seize goods”⁴ For example, the Act of Frauds in the seventeenth century empowered English customs officers to enter virtually any home and seize prohibited goods by “break[ing] open doors, chests, trunks, and other package[s].”⁵ Through court-issued writs of assistance, customs officers essentially had the authority to conduct warrantless searches at their own discretion.⁶ These writs effectively authorized customs officers to search and seize based on nothing more than the officers’ own suspicions.⁷

Such unfettered governmental power sparked heated resistance from the citizenry. In 1761, a prominent lawyer from Massachusetts named James Otis represented a group of Boston citizens and challenged the writs of assistance.⁸ In what later become known as “The Writs of Assistance Case,” Otis argued that the writs were an “instru-

1. U.S. CONST. amend. IV.

2. *Kyllo v. United States*, 533 U.S. 27, 31 (2001) (quoting *Silverman v. United States*, 365 U.S. 505, 511 (1961)).

3. See *Segura v. United States*, 468 U.S. 796, 810 (1984).

4. William J. Stuntz, *The Substantive Origins of Criminal Procedure*, 105 YALE L.J. 393, 404 (1995).

5. See Act of Frauds of 1662, 12 Car. 2, c. 11 § V(2) (Eng.), reprinted in 8 DANBY PICKERING, *THE STATUTES AT LARGE* 78, 81 (London, Bentham 1763).

6. See Act of Frauds of 1696 5 W. & M., c. 22 § VI (Eng.), reprinted in 9 DANBY PICKERING, *THE STATUTES AT LARGE* 428, 430 (London, Bentham 1764); see also Stuntz, *supra* note 4, at 404–05.

7. See Stuntz, *supra* note 4, at 405.

8. See Hon. M. Blane Michael, *Reading the Fourth Amendment: Guidance from the Mischief that Gave it Birth*, 85 N.Y.U. L. REV. 905, 908 (2010).

ment of slavery” and “villainy.”⁹ Ultimately, Otis’s arguments failed to sway the Massachusetts Superior Court.¹⁰ The five-member Superior Court voted unanimously to continue issuing the challenged writs.¹¹ However, Otis’s endeavors were not wholly unsuccessful. Future United States President John Adams attended the hearings and was moved by Otis’s arguments.¹² Otis’s advocacy in *The Writs of Assistance Case* “galvanized support for what became the Fourth Amendment.”¹³ Specifically, Otis helped establish “the principle that a person’s home is especially private and must be protected from arbitrary government intrusion.”¹⁴ Further, Otis revealed “the inevitability of abuse when government officials have . . . unlimited discretion” to search and seize.¹⁵

The Fourth Amendment has substantially evolved following Otis’s contributions. With the recent, exponential growth of technology, Fourth Amendment interpretation has once again become a pressing issue. Just within the last thirty-five years, there has been a constant tug-of-war over the application of the Fourth Amendment requirement that warrants must be supported by probable cause.¹⁶ With each passing case, the legal requirement for sufficient probable cause becomes more flexible. This problem is indicated not only by the increasing number of cases in which courts have permitted unwarranted searches,¹⁷ but also by cases in which courts attempt to justify a search warrant by using questionable offerings of probable cause.¹⁸

Peffer v. Stephens is one of the latest examples of a court attempting to justify a search warrant by using a controversial finding of probable cause.¹⁹ In an issue of first impression, the United States Court of Ap-

9. *Id.*

10. *Id.* at 909.

11. *Id.*

12. *Id.*

13. *Id.* at 908.

14. *Id.* at 908–09.

15. *Id.* at 909.

16. *See, e.g., Illinois v. Gates*, 462 U.S. 213, 238 (1983) (holding that the controlling “two-pronged test” for analyzing whether an informant’s tip establishes probable cause should be abandoned in favor of a “totality-of-the-circumstances” approach).

17. *See, e.g., Terry v. Ohio*, 392 U.S. 1, 27 (1968) (holding that officers may search a person for weapons so long as the officer has reason to believe that he is dealing with an armed individual, regardless of whether the officer has probable cause to arrest); *Warden v. Hayden*, 387 U.S. 294, 298 (1967) (holding that officers in hot pursuit of a fleeing suspect were reasonable in conducting an unwarranted search of a house); *Chambers v. Maroney*, 399 U.S. 42, 48 (1970) (discussing that police may search a car without first obtaining a warrant because of the inherent mobility of a car); *Payton v. New York*, 445 U.S. 573, 588–89 (1980) (discussing that police may enter and search a home without a warrant if exigent circumstances are present).

18. *See, e.g., United States v. Jordan*, 999 F.2d 11, 13 (1993) (holding that there was adequate probable cause to justify searching a home for marijuana contraband despite the officer’s affidavit failing to exclude the possibility that the marijuana may have come from some place other than the defendant’s residence).

19. *See generally Peffer v. Stephens*, 880 F.3d 256, 259 (6th Cir. 2018).

peals for the Sixth Circuit held that there was adequate probable cause to justify a search and seizure within a criminal defendant's home simply because he allegedly used a computer during the commission of a crime.²⁰ Such a shortsighted justification completely ignores the sanctity of the home and erodes Fourth Amendment protections. The holding also fails to consider civil liberties, economic policy, and the exponential rate of technological innovation. Such cases are a significant root of market distortions and negative economic incentives.²¹ Put simply, the holding in *Peffer* is another link in the chain of cases that have trampled on individual rights for the sake of State power.

This Comment argues why the approach in *Peffer* is erroneous. Part II begins this Comment by explaining the legal standard for Fourth Amendment claims that relate to the facts of *Peffer*. Part III provides a factual background of the *Peffer* case and objectively explains the *Peffer* rationale. Part IV analyzes the *Peffer* decision by discussing the legal sufficiency of probable cause and the breadth of the *Peffer* holding. This Section also includes a discussion on the technological, economic, and public policy implications of the *Peffer* decision. Finally, Part V concludes this Comment with a discussion of how the *Peffer* holding may be applied in the future. Further, this Section recommends how search and seizure law should move forward.

II. STANDARD FOR FOURTH AMENDMENT CLAIMS

The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no Warrants shall issue, but upon probable cause, supported by Oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized.²²

The Fourth Amendment governs searches and seizures that are a product of government action.²³ Fourth Amendment protections are "wholly inapplicable 'to a search or seizure . . . effected by a private individual not acting as an agent of the [g]overnment.'"²⁴ The Fourth Amendment is comprised of two separate clauses: (1) a prohibition against unreasonable searches and seizures, and (2) a requirement that all warrants be supported by probable cause.²⁵

20. See *id.* at 273.

21. See *infra* Part IV.

22. U.S. CONST. amend. IV.

23. See *United States v. Jacobsen*, 466 U.S. 109, 113 (1984).

24. See *id.* (quoting *Walter v. United States*, 447 U.S. 649, 662 (1980)).

25. See U.S. CONST. amend. IV.

A. What is a Search?

A search is a governmental intrusion wherever an individual harbors a reasonable expectation of privacy.²⁶ The Supreme Court of the United States has adopted a two-part test to determine whether an individual has a legitimate expectation of privacy.²⁷ The first inquiry is “whether the individual, by his conduct, has ‘exhibited an actual (subjective) expectation of privacy’” in the place or things to be searched.²⁸ Second, the individual’s subjective expectation of privacy must be “one that society is prepared to recognize as ‘reasonable.’”²⁹ In other words, the individual’s subjective expectation of privacy must also be objectively justifiable under the circumstances.³⁰ Some factors that courts around the United States have considered when determining whether a defendant had a reasonable expectation of privacy include:

- (1) Legitimate presence in the area searched;³¹
- (2) Prior use of the area searched;³²
- (3) Ability to control or exclude others’ use of the property;³³
- (4) Proprietary or possessory interest in the place to be searched;³⁴
- (5) Whether the defendant has taken normal precautions to maintain his or her privacy;³⁵
- (6) Whether the place or object searched was put to private use;³⁶ and
- (7) Whether the claim of privacy is consistent with the historical notion of privacy.³⁷

“The Fourth Amendment protects people, not places.”³⁸ The inquiry of whether a search has occurred generally hinges on whether the individual has a valid expectation of privacy, not whether the place to be searched is constitutionally protected.³⁹ For example, “what a person knowingly exposes to the public, even in his own home or of-

26. See *Terry v. Ohio*, 392 U.S. 1, 9 (1968).

27. See *Smith v. Maryland*, 442 U.S. 735, 740 (1979).

28. See *id.* (quoting *Katz v. United States*, 389 U.S. 347, 361 (1967) (Harlan, J., concurring)).

29. *Id.* (quoting *Katz*, 389 U.S. at 361 (Harlan, J., concurring)).

30. *Id.* (quoting *Katz*, 389 U.S. at 353).

31. *United States v. Lochan*, 674 F.2d 960, 965 (1st Cir. 1982).

32. *Id.*

33. *Id.*

34. *United States v. King*, 227 F.3d 732, 744 (6th Cir. 2000).

35. *Id.*

36. *State v. Granville*, 423 S.W.3d 399, 408 (Tex. 2014).

37. *Id.*

38. *Terry v. Ohio*, 392 U.S. 1, 9 (1968) (quoting *Katz v. United States*, 389 U.S. 347, 351 (1967)).

39. See, e.g., *Katz*, 389 U.S. at 351 (explaining that the problem presented is not whether the area in question is constitutionally protected).

fice, is not a subject of Fourth Amendment protection.”⁴⁰ However, what an individual “seeks to preserve as private, even in an area accessible to the public, may be constitutionally protected.”⁴¹

Courts consider the intrusiveness of an action when determining whether government activity constitutes a search.⁴² For example, the use of a drug-sniffing dog at an airport is considered a minimally invasive intrusion and thus generally does not constitute a search under the Fourth Amendment.⁴³ By contrast, blood-testing procedures are intrusions into the human body and are thus considered searches within the meaning of the Fourth Amendment.⁴⁴ Because of the intrusiveness of a blood draw, whenever officers can reasonably obtain a warrant before drawing blood “without significantly undermining the efficacy of the search, the Fourth Amendment mandates that they do so.”⁴⁵

Another factor that courts consider is the sophistication of the technology that the government uses when effectuating a search.⁴⁶ For example, the use of sense-enhancing technology to obtain “information regarding the interior of [a] home . . . constitutes a search—at least where . . . the technology in question is not in general public use.”⁴⁷ In *Kyllo v. United States*, the government used thermal-imaging technology to detect the heat radiating from a house in order to charge a defendant with manufacturing marijuana.⁴⁸ The Supreme Court held that the use of this technology constituted a search under the Fourth Amendment partly because such technology was not generally available for public use.⁴⁹ By contrast, the Supreme Court has held that aerial observation does not constitute a search because the public is “free to inspect the [area] from the vantage point of an aircraft.”⁵⁰ *Kyllo* reinforced the principle that there is no Fourth Amendment search if officers gain information by observing things that are in public view.⁵¹ *Kyllo* reiterated the Court’s holding in *California v. Ciraolo* that “[t]he Fourth Amendment protection of the home has never been

40. *Id.*

41. *Id.*

42. *See, e.g.,* *United States v. Place*, 462 U.S. 696, 707 (1983) (holding that the use of a drug-sniffing dog was not considered a search partly because the use of the dog was minimally invasive).

43. *See id.*

44. *See Schmerber v. California*, 384 U.S. 757, 767 (1966).

45. *See Missouri v. McNeely*, 569 U.S. 141, 152 (2013).

46. *See, e.g.,* *Kyllo v. United States*, 533 U.S. 27, 34 (2001) (explaining that the use of sense-enhancing technology constitutes a search when the technology in question is not generally available for public use).

47. *Id.*

48. *Id.* at 30.

49. *See id.* at 34.

50. *See Florida v. Riley*, 488 U.S. 445, 450 (1989); *see also* DANIEL J. SOLOVE & PAUL M. SCHWARTZ, *INFORMATION PRIVACY LAW* 303 (6th ed. 2018).

51. *See generally* *Kyllo*, 533 U.S. at 32.

extended to require law enforcement officers to shield their eyes when passing by a home on public thoroughfares.”⁵²

A search also occurs when “‘the [g]overnment obtains information by physically intruding’ on” an individual’s property.⁵³ Though property rights are not typically the first consideration in a Fourth Amendment analysis, the Fourth Amendment still precludes the government from physically intruding into a constitutionally protected area for the purpose of obtaining information.⁵⁴ Thus, agents of the State may not “stand in a home’s porch or side garden and trawl for evidence with impunity.”⁵⁵

The areas “immediately surrounding and associated with the home” are considered “part of the home itself for Fourth Amendment purposes.”⁵⁶ For example, the use of a drug-sniffing dog at the front porch of someone’s home constitutes a search.⁵⁷ The American legal concept of privacy evolved such that “[o]ur law holds the property of every man so sacred, that no man can set his foot upon his neighbour’s close without his leave.”⁵⁸ Thus, the State generally may not trespass onto an individual’s property and use a “trained police dog to explore the area around the home in hopes of discovering incriminating evidence.”⁵⁹ Such a trespass constitutes a search without conducting the “reasonable expectation of privacy” test.⁶⁰ Similarly, installing a GPS device on a vehicle constitutes a search because such activity is a physical occupation of private property for the purpose of obtaining information.⁶¹ Put simply, a search occurs either when the government intrudes on a reasonable expectation of privacy⁶² or when the government trespasses onto private property for the purpose of obtaining information.⁶³

B. *What is a Seizure of Property?*

A property seizure generally occurs “when there is some meaningful interference with an individual’s possessory interests in that property.”⁶⁴ Seizures, just like searches, only occur when conducted by a

52. *Id.* (quoting *California v. Ciraolo*, 476 U.S. 207, 213 (1986)).

53. *See Florida v. Jardines*, 569 U.S. 1, 5 (2013) (citing *United States v. Jones*, 565 U.S. 400, 406–07 (2012)).

54. *See id.*; *see also United States v. Knotts*, 460 U.S. 276, 286 (1983) (Brennan, J., concurring).

55. *Jardines*, 569 U.S. at 6.

56. *Id.* (quoting *Oliver v. United States*, 466 U.S. 170, 180 (1984)).

57. *See, e.g., Jardines*, 569 U.S. at 11–12.

58. *Id.* at 8 (quoting *Entick v. Carrington* (1765) 95 Eng. Rep. 807).

59. *See id.* at 9.

60. *See id.* at 11.

61. *See, e.g., United States v. Jones*, 565 U.S. 400, 404 (2012).

62. *See Terry v. Ohio*, 392 U.S. 1, 9 (1968).

63. *See Jardines*, 569 U.S. 1, 5 (2013).

64. *United States v. Jacobsen*, 466 U.S. 109, 113 (1984).

government actor.⁶⁵ The Fourth Amendment's protection against unreasonable seizures does not apply to seizures, even unreasonable ones, "effected by a private individual not acting as an agent of the Government or with the participation or knowledge of any governmental official."⁶⁶ Further, property seizures are "subject to Fourth Amendment scrutiny even [if] no search within the meaning of the [Fourth] Amendment has taken place."⁶⁷

Generally, governmental "assertion of dominion and control" over an individual's tangible property is considered a seizure.⁶⁸ For example, in *United States v. Jacobsen*, federal agents removed four plastic bags from a damaged package at a private freight carrier.⁶⁹ The agents opened each of the four bags and removed traces of a white substance.⁷⁰ The substance was identified as cocaine and arrests were subsequently made for possession of an illegal substance with intent to distribute.⁷¹ The Court in *Jacobsen* held that "the agents' assertion of dominion and control over the package and its contents [constituted] a 'seizure.'"⁷²

Not all governmental interferences with property constitute seizures. Interference does not constitute a seizure when the governmental involvement with the property is insignificant or amounts to merely a "technical trespass."⁷³ For example, in *United States v. Karo*, the government installed a "beeper" on a container of ether in order to monitor its location.⁷⁴ The Court in *Karo* held that the installation of the beeper did not constitute a seizure because it could not "be said that anyone's possessory interest was interfered with in a meaningful way."⁷⁵ The Court found that "[a]t most, there was a technical trespass on the space occupied by the beeper."⁷⁶ Similarly, in *Arizona v. Hicks*, an officer read and recorded the serial numbers of two sets of stolen stereo components.⁷⁷ The Court held that the recording of the serial numbers did not constitute a seizure because it "did not 'meaningfully interfere' with [the individual's] possessory interest in either the serial numbers or the equipment."⁷⁸

65. *See id.*

66. *Id.* (quoting *Walter v. United States*, 447 U.S. 649, 662 (1980)).

67. *Soldal v. Cook Cty.*, 506 U.S. 56, 68 (1992).

68. *See, e.g., Jacobsen*, 466 U.S. at 120.

69. *See id.* at 111.

70. *See id.* at 111-12.

71. *See id.* at 112.

72. *Id.* at 120.

73. *See, e.g., United States v. Karo*, 468 U.S. 705, 712 (1984) (holding that governmental interference with a container did not constitute a seizure partly because the action was a "technical trespass" and did not interfere with possessory interests in a "meaningful way").

74. *See id.* at 708.

75. *Id.* at 712.

76. *Id.*

77. *See Arizona v. Hicks*, 480 U.S. 321, 323 (1987).

78. *Id.* at 324; *see also Maryland v. Macon*, 472 U.S. 463, 469 (1985).

Seizures generally do not occur unless there is interference with a possessory interest in the property involved.⁷⁹ This component of a seizure becomes important in situations when individuals forfeit their possessory interests in an item of property by voluntary abandonment or transfer. For example, the Court in *Maryland v. Macon* held that the purchase of magazines by a county detective did not constitute a seizure because the sales clerk “voluntarily transferred any possessory interest he may have had in the magazines to the purchaser upon the receipt of the funds.”⁸⁰

Although Fourth Amendment seizures generally involve an interference with a person’s possessory interests in tangible property, the Supreme Court has held that even a defendant’s words, in the form of recorded oral statements, can be the subject of a seizure.⁸¹ In these types of cases, the analysis of whether a seizure has occurred becomes similar to the search analysis. For example, the Court in *Katz v. United States* determined that the government seized a defendant’s phone conversation when it intruded upon a reasonable expectation of privacy by recording the defendant’s words electronically.⁸² Put simply, a seizure occurs either “when there is some meaningful interference with an individual’s possessory interests in [tangible] property,”⁸³ or in special circumstances where the government seizes abstracts by intruding upon a reasonable expectation of privacy.⁸⁴

C. *What Makes a Search Within the Home Unreasonable?*

The Fourth Amendment only prohibits *unreasonable* searches, not reasonable ones.⁸⁵ Further, “warrantless searches are presumptively unreasonable.”⁸⁶ Thus, a search is “ordinarily unreasonable in the absence of individualized suspicion of wrongdoing.”⁸⁷ Case by case, the Fourth Amendment warrant requirement has become subject to numerous exceptions.⁸⁸ Warrantless searches have become reasonable so

79. See *United States v. Jacobsen*, 466 U.S. 109, 113 (1984).

80. *Maryland v. Macon*, 472 U.S. 463, 469 (1985).

81. See, e.g., *Katz v. United States*, 389 U.S. 347, 353 (1967).

82. See *id.*

83. *Jacobsen*, 466 U.S. at 113.

84. See, e.g., *Katz*, 389 U.S. at 353 (holding that the government seized a defendant’s phone conversation when it intruded upon a reasonable expectation of privacy by recording the defendant’s words electronically).

85. U.S. CONST. amend. IV (emphasis added).

86. *Jacobsen*, 466 U.S. at 141.

87. *City of Indianapolis v. Edmond*, 531 U.S. 32, 37 (2000).

88. See, e.g., *Terry v. Ohio*, 392 U.S. 1, 27 (holding that officers may search a person for weapons so long as the officer “has reason to believe that he is dealing with an armed and dangerous individual, regardless of whether [the officer] has probable cause to arrest”); *Warden v. Hayden*, 387 U.S. 294, 298 (1967) (holding that officers in hot pursuit of a fleeing suspect were reasonable in conducting an unwarranted search of a house); *Chambers v. Maroney*, 399 U.S. 42, 48 (1970) (discussing that police may search a car without first obtaining a warrant because of the inherent mobility of a

long as they fall within any one of the recognized exceptions to the warrant requirement.⁸⁹

The United States Supreme Court has held that “the Fourth Amendment draws ‘a firm line at the entrance to the house.’”⁹⁰ The home is sacred under the Fourth Amendment because “[a]t the very core’ of the Fourth Amendment ‘stands the right of a man to retreat into his own home and there be free from unreasonable governmental intrusion.’”⁹¹ Thus, an even “greater burden is placed on [government] officials who enter a home or dwelling without consent.”⁹² The Court has held that “the ‘physical entry of the home is the chief evil against which the wording of the Fourth Amendment is directed.’”⁹³ But despite the sanctity of the home, there are still many exceptions to the warrant requirement when the government conducts a search within an individual’s household.⁹⁴

One of the most recognized exceptions to the warrant requirement applies “when the exigencies of the situation make the needs of law enforcement so compelling that a warrantless search is objectively reasonable under the Fourth Amendment.”⁹⁵ To determine whether exigent circumstances exist, courts apply a finely tuned “totality of the circumstances” test.⁹⁶ There are many examples of circumstances that “may give rise to an exigency sufficient to justify a warrantless search.”⁹⁷ Some examples include:

- (1) “Law enforcement’s need to provide emergency assistance to an occupant of a home”;⁹⁸
- (2) When law enforcement is in “hot pursuit” of a fleeing suspect;⁹⁹

car); *Payton v. New York*, 445 U.S. 573, 588–89 (1980) (discussing that police may enter and search a home without a warrant if exigent circumstances are present).

89. See *Missouri v. McNeely*, 569 U.S. 141, 148 (2013).

90. *Kyllo v. United States*, 533 U.S. 27, 40 (2001) (quoting *Payton*, 445 U.S. at 590).

91. See *id.* at 31. (quoting *Silverman v. United States*, 365 U.S. 505, 511 (1961)).

92. See *Payton*, 445 U.S. at 587 (quoting *Dorman v. United States*, 435 F.2d 385, 389 (D.C. Cir. 1970)).

93. *Id.* at 585–86 (quoting *United States v. U.S. Dist. Court*, 407 U.S. 297, 313 (1972)).

94. See, e.g., *id.* at 588–89 (discussing that police may enter and search a home without a warrant if exigent circumstances are present); *Warden v. Hayden*, 387 U.S. 294, 298 (1967) (holding that officers in hot pursuit of a fleeing suspect were reasonable in conducting an unwarranted search of a house).

95. *Missouri v. McNeely*, 569 U.S. 141, 148–49 (2013) (quoting *Kentucky v. King*, 563 U.S. 452, 460 (2011)).

96. *Id.* at 149.

97. See *id.*

98. See, e.g., *id.* (citing *Michigan v. Fisher*, 558 U.S. 45, 47–48 (2009) (per curiam)).

99. See, e.g., *United States v. Santana*, 427 U.S. 38, 42–43 (1976).

- (3) Law enforcement “enter[ing] a burning building to put out a fire and investigate its cause”,¹⁰⁰ and
- (4) To “prevent the imminent destruction of evidence.”¹⁰¹

Ultimately, each case of alleged exigency is evaluated “based ‘on its own facts and circumstances.’”¹⁰² But in the absence of exigent circumstances, a warrantless entry to search is generally considered unreasonable and is thus unconstitutional.¹⁰³

Another exception to the warrant requirement exists when an officer performs a search incident to arrest.¹⁰⁴ The Fourth Amendment permits an officer to arrest an individual for “even a very minor criminal offense,” so long as the officer “has probable cause to believe that [the] individual has committed” the offense in the officer’s presence.¹⁰⁵ Further, a search may be permissible even if its justification includes a reasonable mistake of fact or law.¹⁰⁶ At the time of arrest, officers may lawfully search the arrestee and the area within the arrestee’s control.¹⁰⁷ Generally, officers must have an arrest warrant to effectuate a nonemergency arrest of an individual inside his or her own home.¹⁰⁸ However, whenever officers are lawfully conducting an arrest inside an individual’s home, the officers may lawfully search the area within the individual’s control.¹⁰⁹

Officers may also conduct a search when an individual gives consent.¹¹⁰ The Supreme Court has held that “[e]ven when law enforcement officers have no basis for suspecting a particular individual, they may pose questions, ask for identification, and request consent to search . . . provided they do not induce cooperation by coercive means.”¹¹¹

Consent must be voluntary.¹¹² Voluntariness is determined by examining the totality of the circumstances.¹¹³ When examining the surrounding circumstances, “account must be taken of subtly coercive

100. See, e.g., *McNeely*, 569 U.S. at 149 (citing *Michigan v. Tyler*, 436 U.S. 499, 509–10 (1978)).

101. See *id.* at 149 (citing *Cupp v. Murphy*, 412 U.S. 291, 296 (1973)).

102. *Id.* at 150 (quoting *Go-Bart Importing Co. v. United States*, 282 U.S. 344, 357 (1931)).

103. See *Payton v. New York*, 445 U.S. 573, 587–88 (1980).

104. See *United States v. Robinson*, 414 U.S. 218, 224 (1973).

105. See *Atwater v. City of Lago Vista*, 532 U.S. 318, 354 (2001).

106. See *Heien v. North Carolina*, 574 U.S. 54, 57–60 (2014).

107. See *Robinson*, 414 U.S. at 224–25.

108. See *Payton*, 445 U.S. at 585, 588–89; see also *Welsh v. Wisconsin*, 466 U.S. 740, 753 (1984) (holding that a warrantless arrest inside an individual’s home for a minor offense violated the Fourth Amendment).

109. See *Robinson*, 414 U.S. at 224.

110. See, e.g., *United States v. Drayton*, 536 U.S. 194, 201 (2002) (explaining that the Fourth Amendment permits officers to request consent to search).

111. *Id.*

112. See *id.* at 207.

113. See *id.*

police questions, as well as the possibly vulnerable subjective state of the person who consents.”¹¹⁴ Officers are not required to “inform citizens of their right to refuse when seeking permission to conduct a warrantless consent search.”¹¹⁵

Under some circumstances, such as when officers are dealing with co-tenants of a residence, a third party may give consent on behalf of another individual if officers reasonably believe that the third party has apparent authority to give consent.¹¹⁶ However, if one tenant consents but another objects to being searched, there must be either exigent circumstances or a search warrant in order for officers to enter the property.¹¹⁷ Ultimately, valid-consent searches are one of the many exceptions to the warrant requirement under the Fourth Amendment.¹¹⁸ Warrantless searches—especially those within the home—must fall within one of these recognized exceptions in order to be considered reasonable.¹¹⁹

D. *What Makes a Seizure of Property Unreasonable?*

The Fourth Amendment prohibits unreasonable seizures.¹²⁰ Generally, there must be “a nexus . . . between the item to be seized and [the] criminal behavior” in question.¹²¹ Similar to searches, “a seizure of personal property [is] *per se* unreasonable within the meaning of the Fourth Amendment unless it is accomplished pursuant to a judicial warrant issued upon probable cause and particularly describing the items to be seized.”¹²² The Fourth Amendment’s requirement that property seizures must generally be supported by a warrant has also become subject to numerous exceptions.¹²³

Perhaps the most recognized exception to the warrant requirement as it applies to property seizures is known as the “plain view” doctrine.¹²⁴ Under this doctrine, “objects falling in the plain view of an officer who has a right to be in the position to have that view are subject to seizure and may be introduced in evidence.”¹²⁵ This doc-

114. *Schneckloth v. Bustamonte*, 412 U.S. 218, 229 (1973).

115. *See Drayton*, 536 U.S. at 206.

116. *See Illinois v. Rodriguez*, 497 U.S. 177, 186 (1990).

117. *See, e.g., Georgia v. Randolph*, 547 U.S. 103, 114–15 (2006).

118. *See, e.g., Drayton*, 536 U.S. at 201 (explaining that the Fourth Amendment permits officers to request consent to search).

119. *See Missouri v. McNeely*, 569 U.S. 141, 148 (2013); *see also Payton*, 445 U.S. 573, 587 (1980) (explaining that a “greater burden” is placed on government officials who seek to enter a home).

120. *See U.S. CONST. amend. IV.*

121. *See Warden v. Hayden*, 387 U.S. 294, 307 (1967).

122. *United States v. Place*, 462 U.S. 696, 701 (1983).

123. *See, e.g., Coolidge v. New Hampshire*, 403 U.S. 443, 464–65 (1971) (discussing the “plain view” exception to the warrant requirement).

124. *Id.*

125. *Harris v. United States*, 390 U.S. 234, 236 (1968).

trine applies even when officers are inside a home.¹²⁶ For example, if officers have a warrant to search a specific area—such as a household—for certain objects, and “in the course of the search come across some other article[s] of incriminating character,” the officers may lawfully seize those articles.¹²⁷

“Plain view” seizures are also permissible when the officers’ initial intrusion is supported by one of the other recognized exceptions to the warrant requirement.¹²⁸ Thus, officers may seize items in “plain view” when the officers’ initial intrusion is based on a finding of exigent circumstances.¹²⁹ For example, officers may unintentionally discover incriminating evidence in “plain view” during scenarios involving hot pursuit of a fleeing suspect¹³⁰ or a search incident to arrest.¹³¹ However, “the ‘plain view’ doctrine may not be used to extend a general exploratory search from one object to another until something incriminating at last emerges.”¹³² “Plain view” seizures are “legitimate only where it is immediately apparent to the police that they have evidence before them”¹³³

Another exception to the warrant requirement as it applies to property seizures exists when an individual has no reasonable expectation of privacy in the items being seized.¹³⁴ For example, in *Jacobsen*, the Supreme Court held that a package at a private freight carrier could “no longer support any expectation of privacy.”¹³⁵ Thus, the Court held that the package “may be seized, at least temporarily, without a warrant.”¹³⁶ However, it is rarely a challenging issue to determine whether an individual has a reasonable expectation of privacy in activity that happens inside the individual’s home, at least where such activity is not in “plain view.” The home is considered sacred.¹³⁷ As explained by the Court in *Kyllo*, there is always at least some “minimal expectation of privacy that exists” in cases regarding searches

126. See *Horton v. California*, 496 U.S. 128, 135 (1990) (explaining that the “plain view” doctrine is applicable to “situation[s] in which the police have a warrant to search a given area for specified objects, and in the course of the search come across some other article of incriminating character”) (citations omitted).

127. See *id.* (citations omitted).

128. See *id.* (citations omitted).

129. See *id.* at 135–36 (citations omitted).

130. See *id.* at 135 (explaining that “police may inadvertently come across evidence while in ‘hot pursuit’ of a fleeing suspect”) (citations omitted).

131. See *id.* (explaining that “an object that comes into view during a search incident to arrest that is appropriately limited in scope under existing law may be seized without a warrant”) (citations omitted).

132. *Id.* at 136 (citations omitted).

133. *Id.* (citations omitted).

134. See *United States v. Jacobsen*, 466 U.S. 109, 121–22 (1984).

135. *Id.*

136. See *id.* at 121.

137. See *Payton v. New York*, 445 U.S. 573, 585 (1980) (explaining that the “physical entry of the home is the chief evil against which the wording of the Fourth Amendment is directed”) (citation omitted).

within the interior of a home.¹³⁸ Thus, it is hard to imagine a lawful, warrantless seizure of items inside a home based on a finding that the homeowner had no reasonable expectation of privacy in those items. Ultimately, warrantless seizures—especially those within the home—must fall within one of the recognized exceptions to the warrant requirement in order to be considered reasonable.¹³⁹

E. *Probable Cause*

“[N]o Warrants shall issue, but upon probable cause, supported by Oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized.”¹⁴⁰ Search warrants “may be issued to search *any* property, whether or not occupied by a third party, at which there is probable cause to believe that fruits, instrumentalities, or evidence of a crime will be found.”¹⁴¹ However, there must be “‘reasonable cause to believe that the specific [evidence] to be searched for and seized are located on the property’ . . . not merely ‘that the owner of property is suspected of a crime.’”¹⁴² The Supreme Court has held that “[p]robable cause exists when there is a ‘fair probability,’ given the totality of the circumstances, that contraband or evidence of a crime will be found in a particular place.”¹⁴³

Inferences of probable cause must be “drawn by ‘a neutral and detached magistrate instead of being judged by the officer engaged in the often competitive enterprise of ferreting out crime.’”¹⁴⁴ Magistrates issuing search warrants must meet two requirements: (1) they must be “neutral and detached,” and (2) they “must be capable of determining whether probable cause exists” for the requested search.¹⁴⁵ A magistrate may infer where evidence is likely to be found based on “the nature of the crime and type of offense.”¹⁴⁶ However, in order to make a determination of probable cause, “the issuing judge must undertake a ‘practical, common sense’ evaluation of ‘all of the circumstances set forth in the affidavit before him.’”¹⁴⁷

138. See *Kyllo v. United States*, 533 U.S. 27, 34 (2001).

139. See *United States v. Place*, 462 U.S. 696, 701 (1983) (explaining that warrantless seizures are *per se* unreasonable unless supported by a warrant); see also *Coolidge v. New Hampshire*, 403 U.S. 443, 464–65 (1971) (discussing an example of an exception to the warrant requirement).

140. U.S. CONST. amend. IV.

141. *Zurcher v. Stanford Daily*, 436 U.S. 547, 554 (1978).

142. See *United States v. McPhearson*, 469 F.3d 518, 524 (6th Cir. 2006) (quoting *Zurcher*, 436 U.S. at 556).

143. *United States v. Loggins*, 777 F.2d 336, 338 (6th Cir. 1985).

144. *Shadwick v. City of Tampa*, 407 U.S. 345, 350 (1972) (quoting *Johnson v. United States*, 333 U.S. 10, 14 (1948)).

145. *Id.*

146. *United States v. Williams*, 544 F.3d 683, 686 (6th Cir. 2008) (quoting *United States v. Caicedo*, 85 F.3d 1184, 1192 (6th Cir. 1996)).

147. *Id.* (quoting *United States v. Loughton*, 409 F.3d 744, 747 (6th Cir. 2005)).

An officer's affidavit presented in support of probable cause must contain "particularized facts demonstrating 'a fair probability that evidence of a crime will be located on the premises of the proposed search.'" ¹⁴⁸ The belief that the evidence will be found at the place to be searched requires "more than mere suspicion." ¹⁴⁹ In other words, a hunch does not equate to probable cause. ¹⁵⁰ Furthermore, simple "good faith on the part of the arresting officer is not enough." ¹⁵¹ As explained by the Supreme Court in *Terry v. Ohio*, "[i]f subjective good faith alone were the test, the protections of the Fourth Amendment would evaporate, and the people would be 'secure in their persons, houses, papers, and effects,' only in the discretion of the police." ¹⁵²

The purpose of the neutral and detached magistrate requirement is to create an "assurance that a search and arrest will not proceed without probable cause to believe that a crime has been committed and that the person or place named in the warrant is involved in the crime." ¹⁵³ Accordingly, "[t]he critical element in a reasonable search is not that the owner of the property is suspected of [a] crime but that there is reasonable cause to believe that the specific 'things' to be searched for and seized are located on the property to which entry is sought." ¹⁵⁴ In other words, there must be a sufficient "nexus between the evidence sought and the place to be searched." ¹⁵⁵

Whether an officer's affidavit establishes a proper nexus between the evidence sought and the place to be searched is "a fact-intensive question resolved by examining the totality of the circumstances presented." ¹⁵⁶ Magistrates may "infer a nexus between a suspect and his residence, depending upon 'the type of crime being investigated, the nature of things to be seized, the extent of an opportunity to conceal the evidence elsewhere and the normal inferences that may be

148. *United States v. McPhearson*, 469 F.3d 518, 524 (6th Cir. 2006) (quoting *United States v. Frazier*, 423 F.3d 526, 531 (6th Cir. 2005)).

149. *Williams*, 544 F.3d at 686 (quoting *United States v. Bethal*, 245 F. App'x 460, 464 (2007)) (citation omitted).

150. *See Terry v. Ohio*, 392 U.S. 1, 22 (1968) (explaining that the Court refuses to sanction "intrusions upon constitutionally guaranteed rights based on nothing more substantial than inarticulate hunches").

151. *Id.*

152. *Id.* (quoting *Beck v. Ohio*, 379 U.S. 89, 97 (1964)).

153. *Shadwick v. City of Tampa*, 407 U.S. 345, 350 (1972).

154. *Zurcher v. Stanford Daily*, 436 U.S. 547, 556 (1978).

155. *See United States v. Brown*, 828 F.3d 375, 382 (6th Cir. 2016); *see also* *Greene v. Reeves*, 80 F.3d 1101, 1106 (6th Cir. 1996) (explaining that "the probable cause requirement . . . is satisfied if the facts and circumstances are such that a reasonably prudent person would be warranted in believing that an offense had been committed and that evidence thereof would be found on the premises to be searched").

156. *Brown*, 828 F.3d at 382.

drawn as to likely hiding places.’”¹⁵⁷ But ultimately, probable cause must be supported by more than just a hunch.¹⁵⁸

III. *PEFFER V. STEPHENS*

A. *Background*

In June of 2011, Jesse Pepper served as a “caregiver for several medical-marijuana patients, for whom he grew marijuana sufficient to cover their medical-marijuana needs.”¹⁵⁹ When Pepper’s cannabis plants produced more marijuana than he needed, Pepper sold the surplus to Tom Beemer, who owned a medical-marijuana dispensary.¹⁶⁰ Pepper was unaware that Beemer was working for law enforcement as a confidential informant for both the Central Michigan Enforcement Team (“CMET”) and the Traverse Narcotics Team (“TNT”).¹⁶¹

Beemer asked Pepper to sell him more marijuana than was permitted under the Michigan Medical Marihuana Act.¹⁶² Growing suspicious of Beemer’s request, Pepper agreed to meet with him.¹⁶³ As Pepper drove to the meeting, he was stopped by Officers Coon, King, and Edinger.¹⁶⁴ During the stop, the officers found more marijuana in Pepper’s car than he was allowed to possess under state law.¹⁶⁵ Accordingly, the officers arrested Pepper and charged him with possession with intent to distribute and conspiracy to distribute marijuana.¹⁶⁶

Eight months later, the local school district and child services agency received typewritten letters purporting to be written by Officer Coon.¹⁶⁷ The letters accused Beemer of distributing controlled substances and becoming a confidential informant “in exchange for immunity [and] leniency in sentencing.”¹⁶⁸ Officer Coon denied creating the letters.¹⁶⁹ Police identified five potential suspects who may have authored the letters, two of whom were Jesse Pepper and his wife.¹⁷⁰

Over a year later, an investigating officer named Trooper Glentz received two packages in the mail, each containing marijuana seeds.¹⁷¹

157. *United States v. Williams*, 544 F.3d 683, 687 (6th Cir. 2008) (quoting *United States v. Savoca*, 761 F.2d 292, 298 (6th Cir. 1985)).

158. *See Terry v. Ohio*, 392 U.S. 1, 22 (1968) (explaining that the Court refuses to sanction “intrusions upon constitutionally guaranteed rights based on nothing more substantial than inarticulate hunches”).

159. *See Pepper v. Stephens*, 880 F.3d 256, 260 (6th Cir. 2018).

160. *Id.*

161. *Id.*

162. *Id.*

163. *Id.*

164. *Id.*

165. *Id.*

166. *Id.*

167. *Id.*

168. *Id.*

169. *Id.*

170. *Id.* at 261.

171. *Id.*

The packages had been returned to Trooper Glentz's house due to insufficient postage.¹⁷² Trooper Glentz denied sending the packages.¹⁷³ Further, a sergeant named Mike Stephens was informed that two different types of fliers were being mailed to local businesses and residences identifying Beemer as a confidential informant.¹⁷⁴ One type of the fliers displayed a picture of Beemer, listed the charges against him, and requested that the public contact law enforcement should they have any information.¹⁷⁵ The other type of flier had the same picture and list of charges but also contained a political attack aimed at the local prosecutor who was believed to be part of Beemer's cases.¹⁷⁶ Investigators concluded that Pepper was most likely the person responsible for the fliers.¹⁷⁷

Believing Pepper was responsible for sending the fliers, Sergeant Stephens obtained a warrant to search the Pepper residence.¹⁷⁸ Sergeant Stephens's affidavit in support of the search warrant "provided details as to the letters that had been sent, the suspected marijuana seeds, the fliers, and the potential connections between Mr. Pepper and the mailings."¹⁷⁹ As the Sixth Circuit explained, the warrant "authorized the following personal property to be searched for at the house and, if found, to be searched and seized:

(1) 'records, files, or documents pertaining to Thomas Owen Beemer and his role as a confidential informant and/or dismissal of charges in' certain courts, with 'documents' described as including 'records or documents which were created, modified . . . or interpreted by a computer' and more specifically identified to include certain computer hardware, computer-related equipment, peripheral and storage devices, software and other items used for computer operation, communication, encryption, and access, as well as electronic mail ("e-mail") and other electronically stored communications or messages; and

(2) '[a]ny and all mailing items including but not limited to envelopes, address labels, and stamps that match the items seized in this investigation.'"¹⁸⁰

The magistrate found that probable cause existed for the searches and seizures based on Sergeant Stephens's affidavit in which he asserted that the house "may contain evidence of the crime of Impersonating a Police Officer and Witness Intimidation."¹⁸¹ Sergeant

172. *Id.*

173. *Id.*

174. *Id.*

175. *Id.*

176. *Id.*

177. *Id.*

178. *Id.*

179. *Id.*

180. *Id.* at 261–62.

181. *Id.* at 262.

Stephens and five other officers executed the warrant at the Peffer residence on the same day it was issued.¹⁸² The officers seized “a laptop, two computer towers, two printers, a digital video recorder, an audio recorder, and a number of envelopes, stamps, and papers.”¹⁸³ Following further investigation into the matter, “prosecutors declined to pursue any criminal charges against the Peffers.”¹⁸⁴

As a result, the Peffers brought a civil suit against Sergeant Stephens and other defendants, alleging a deprivation of rights stemming from Mr. Peffer’s traffic stop and the search of the Peffer residence.¹⁸⁵ As part of the suit, “the Peffers alleged that Sergeant Stephens’s affidavit lacked facts sufficient to support the magistrate’s finding that there was probable cause to search” their residence “because the affidavit failed to establish that a crime had been committed or that a nexus existed between the alleged crimes and the house, in part because it failed to establish probable cause to believe that Mr. Peffer had committed the alleged crimes.”¹⁸⁶ Additionally, the Peffers alleged that “Sergeant Stephens’s reliance on the warrant was unreasonable, [thus] rendering qualified immunity inapplicable.”¹⁸⁷

Rejecting the Peffers’ arguments, the district court granted Sergeant Stephens’s motion for summary judgment.¹⁸⁸ Accordingly, the Peffers appealed to the Sixth Circuit.¹⁸⁹ The Sixth Circuit was then tasked with determining “the extent of the Fourth Amendment’s requirements for an affidavit supporting a warrant to search the residence of an individual suspected of committing a crime involving the use of a computer.”¹⁹⁰

B. *Holding and Reasoning*

In a unanimous decision written by Judge John Bush, the Sixth Circuit affirmed the lower court’s ruling that Sergeant Stephens executed a valid warrant supported by probable cause.¹⁹¹ The court began by acknowledging the presumption that a warrant was required before searching the Peffer residence.¹⁹²

The court then moved into its analysis of whether the warrant was adequately supported by probable cause.¹⁹³ As the court explained, “[p]robable cause exists if ‘the facts and circumstances are such that a

182. *Id.*

183. *Id.*

184. *Id.*

185. *Id.*

186. *Id.*

187. *Id.*

188. *Id.*

189. *Id.*

190. *Id.* at 259.

191. *Id.* at 259, 273–74.

192. *Id.* at 262.

193. *Id.* at 263.

reasonably prudent person would be warranted in believing that an offense had been committed and that evidence thereof would be found on the premises to be searched.’”¹⁹⁴ Further, the court asserted that “[t]he Fourth Amendment does not require probable cause to believe evidence will *conclusively* establish a fact before permitting a search”¹⁹⁵ Instead, as the court explained, the Fourth Amendment simply requires that there be “probable cause . . . to believe that the evidence sought *will aid* in a particular apprehension or conviction.”¹⁹⁶

The Peffers argued that Sergeant Stephens’s affidavit did not establish probable cause for two main reasons.¹⁹⁷ First, the Peffers argued that the affidavit did not provide reason to believe “that a crime had been committed.”¹⁹⁸ Second, the Peffers argued that the affidavit did not establish “that evidence of the alleged crime would be found at [their] residence.”¹⁹⁹

The Sixth Circuit’s opinion resolved these two arguments separately. First, the court opted not to address whether there was a Fourth Amendment violation regarding the affidavit failing to “properly allege that a crime had been committed.”²⁰⁰ Instead, the court concluded “that there was no *clearly* established constitutional violation,” thus Sergeant Stephens was protected by qualified immunity.²⁰¹ As the court explained, “it was not clearly established that Mr. Peffer’s actions as alleged in the affidavit *did not* violate” Michigan state law.²⁰²

Essentially, the crime that Mr. Peffer was charged with was “unsettled state law.”²⁰³ The court concluded that it was “an open question of Michigan law whether a private citizen writing under the guise of a police officer to request an official to perform an official action constitutes an attempt to ‘compel’ action under” the Michigan Penal Code.²⁰⁴ As a result, the court held that even if Mr. Peffer’s actions were not criminal under the Michigan Penal Code, “the law on this point was not clearly established.”²⁰⁵ Thus, Sergeant Stephens was “protected by qualified immunity from liability”²⁰⁶

Next, the court addressed the Peffers’ argument that “the warrant was constitutionally defective because the affidavit failed to present

194. *Id.* (quoting *Greene v. Reeves*, 80 F.3d 1101, 1106 (6th Cir. 1996)).

195. *Id.* (quoting *Messerschmidt v. Millender*, 565 U.S. 535, 552 n.7 (2012)).

196. *Id.* (quoting *Messerschmidt*, 565 U.S. at 552 n.7).

197. *Id.* at 264.

198. *Id.*

199. *Id.*

200. *Id.*

201. *Id.* (emphasis added).

202. *Id.* at 265.

203. *Id.* at 264.

204. *Id.* at 266.

205. *Id.*

206. *Id.*

facts sufficient to establish that ‘evidence thereof would be found on the premises to be searched.’”²⁰⁷ The Peffers argued that “[b]ecause the affidavit allege[d] Mr. Pepper as the only link between the mailings and the [Peffer] residence, if there was no probable cause to believe that he originated the mailings, there would be no probable cause to believe that evidence of the mailings would be found at the [Peffer] residence.”²⁰⁸ The Peffers raised multiple points in support of this argument, a few of which the court decided to discuss.²⁰⁹

First, the affidavit stated, “Det. Coon informed D/Sgt. Lator that he suspected Jesse Lee Pepper . . . as being the author and sender of the letters based on his CMET experience and contacts.”²¹⁰ The Peffers argued that this portion of the affidavit “was nothing more than the ‘unsupported conclusion[] of [Detective] Coon’ and that ‘no facts . . . were attested to so that the magistrate could draw his own conclusion.’”²¹¹ The court acknowledged that “Detective Coon’s suspicion, unsupported by an articulation of its basis, [was] insufficient to support a finding of probable cause”²¹² However, the court held that the affidavit, taken as a whole, “clearly support[ed] the magistrate’s finding of probable cause to believe that the mailings originated with Mr. Pepper.”²¹³ Specifically, Sergeant Stephens’s affidavit contended that:

- (1) Beemer had provided information that led to Mr. Pepper’s arrest;
- (2) The letters naming Beemer had been sent after Mr. Pepper’s arrest;
- (3) The fliers, which specifically named a prosecutor who had been present at Mr. Pepper’s sentencing, had been sent within two weeks of said sentencing;
- (4) Trooper Glentz received the marijuana seeds while he was trying to contact Mr. Pepper;
- (5) Mr. Pepper was the only person on whom Beemer had informed whom Trooper Glentz had attempted to contact;
- (6) The fliers asked for any information regarding Beemer to be forwarded to CMET and TNT, and Mr. Pepper was the only individual in the counties targeted by the mailings who had been charged with crimes stemming from interactions with both CMET and TNT; and
- (7) The mailings had been postmarked from Grand Rapids, which is the central sorting facility for the area where the [Peffers] residence is located.²¹⁴

207. *Id.* (quoting *Greene v. Reeves*, 80 F.3d 1101, 1106 (6th Cir. 1996)).

208. *Id.*

209. *Id.*

210. *Id.*

211. *Id.*

212. *Id.* at 266–67.

213. *Id.* at 267.

214. *Id.*

Based on these contentions, the Sixth Circuit concluded that “no reasonable jury could fail to find that Sergeant Stephens’s affidavit provided ‘adequate supporting facts about the underlying circumstances to show that probable cause exist[ed]’ to connect Mr. Peffer to the mailings.”²¹⁵ The Sixth Circuit also rejected the Peffers’ argument that Sergeant Stephens’s affidavit contained materially false statements.²¹⁶

Next, the court analyzed the nexus between the mailings and the Peffers’ residence.²¹⁷ The Peffers began by arguing that Sergeant Stephens’s affidavit lacked sufficient facts to support a belief that evidence of the mailings would be found at the home.²¹⁸ The Peffers pointed to the fact that in the affidavit, “no assertion was made that Mr. Peffer owned either a computer or a printer or, if he did, that he kept those items at [his] residence.”²¹⁹

In response,

Sergeant Stephens argue[d] that the magistrate was reasonable in finding a connection between the [Peffer] residence and the items to be sought because the affidavit reported that the letters and fliers appeared to be computer-generated . . . [and] evidence of those documents was likely to be found on an electronic storage device, which . . . would likely be kept at its owner’s residence.²²⁰

As the court explained, it was a question of first impression “whether the nature of a computer is such that its use in a crime is alone sufficient to justify an inference that, because of ‘the nature of the things to be seized,’ evidence of the crime is likely to be found in the alleged criminal’s residence.”²²¹ According to the court, “this question is not a difficult one to answer based on basic principles.”²²²

The court began its analysis by arguing that “it is reasonable . . . to assume that a person keeps his possessions where he resides.”²²³ Further, “[i]f an affidavit presents probable cause to believe that a crime has been committed by means of an object, . . . a magistrate may presume that there is a nexus between that object and the suspect’s current residence, unless the affidavit contains facts that may rebut that presumption.”²²⁴ The Sixth Circuit admitted that it had never before “articulated this presumption in precisely this manner.”²²⁵ Nonetheless, the Sixth Circuit chose to adopt this presumption after analyzing

215. *Id.* (quoting *United States v. Weaver*, 99 F.3d 1372, 1377 (6th Cir. 1996)).

216. *See id.* at 268.

217. *Id.* at 269.

218. *Id.*

219. *Id.*

220. *Id.*

221. *Id.* at 270.

222. *Id.*

223. *Id.*

224. *Id.* at 270–71.

225. *Id.* at 271.

some of its previous cases involving “the connection between the objects used in a crime and the alleged criminal’s residence.”²²⁶

First, the court created an analogy between cases involving the use of a computer and cases involving the use of a firearm.²²⁷ Regarding firearms, the Sixth Circuit has “acknowledged that individuals who own guns keep them at their homes.”²²⁸ Thus, “a suspect’s use of a gun in the commission of a crime is sufficient to find a nexus between the gun that was used and the suspect’s residence.”²²⁹ The court admitted, however, that “[c]omputers are dissimilar to guns in many ways”²³⁰ Nonetheless, the court asserted that guns and computers “are both personal possessions often kept in their owner’s residence and therefore subject to the presumption that a nexus exists between an object used in a crime and the suspect’s current residence.”²³¹

Next, the court pointed to three child pornography cases where search warrants were supposedly issued based “on affidavits with scant evidence supporting a nexus beyond the use of a computer.”²³² The first case found that an “affidavit established nexus because [it alleged that] the suspect’s residence had high-speed internet and the suspect had been observed using a laptop on his front porch.”²³³ The second case found that an affidavit established nexus because it alleged that “the IP address used to distribute prohibited material was accessed by a residential modem located in the general vicinity of the suspect’s residence”²³⁴ Finally, the third case found that an affidavit established a nexus because it “established that the suspect had a computer at his residence and had sent an email containing prohibited material”²³⁵

The court then attempted to draw a distinction between cases involving the use of a computer and cases involving drug distribution.²³⁶ This is because in cases involving drug distribution, the Sixth Circuit had previously held that “if the affidavit fails to include facts that directly connect the residence with the suspected drug dealing activity, or the evidence of this connection is unreliable, it cannot be inferred that drugs will be found in the defendant’s home—even if the defendant is a known drug dealer.”²³⁷ The court reasoned that, “unlike guns and computers that are used in the commission of a crime, when drugs

226. *Id.*

227. *Id.* at 272.

228. *Id.* at 271 (quoting *United States v. Smith*, 182 F.3d 473, 480 (6th Cir. 1999)).

229. *Id.*

230. *Id.* at 272.

231. *Id.*

232. *Id.*

233. *Id.* (citing *United States v. Elbe*, 774 F.3d 885, 889–90 (6th Cir. 2014)).

234. *Id.* (citing *United States v. Lapsins*, 570 F.3d 758, 766 (6th Cir. 2009)).

235. *Id.* (citing *United States v. Terry*, 522 F.3d 645, 648 (6th Cir. 2008)).

236. *Id.* at 272–73.

237. *United States v. Brown*, 828 F.3d 375, 384 (6th Cir. 2016).

are used in the commission of a distribution offense, the distributed drugs are no longer in the possession of the suspected distributor.”²³⁸ Under the court’s view, “guns and computers are objects that generally remain in the suspect’s possession after commission of the crime, and therefore it is reasonable to believe those possessions to be stored at the suspect’s residence, absent evidence to the contrary.”²³⁹

Accordingly, in *Peffer*, the court held that Sergeant Stephens’s “affidavit included allegations that Mr. Peffer had used a computer in the commission of his crime, [and] that evidence of the crime would likely be found on that computer, . . . thereby establishing a presumption that evidence of the crime would be found at [his] residence.”²⁴⁰ According to the court, the fact that “the affidavit did not allege that Mr. Peffer owned a computer or that he kept one at [his] residence is immaterial, because the averment that he used one in the commission of a crime is sufficient to create the presumption that it would be found at his residence.”²⁴¹ Thus, the Sixth Circuit held that “Sergeant Stephens executed a valid warrant supported by probable cause,” and there was no Fourth Amendment violation when officers searched the Peffer residence.²⁴²

IV. ANALYSIS OF THE *PEFFER* RATIONALE

A. *Was the Affidavit Supported by Legally Sufficient Probable Cause?*

In *Peffer*, neither side disputed that a warrant was necessary before searching the Peffer residence and seizing items inside.²⁴³ The facts in *Peffer* would not fall under any of the well-recognized exceptions to the warrant requirement.²⁴⁴ Consequently, the initial question is whether the search warrant was supported by legally sufficient probable cause. In this issue of first impression, the Sixth Circuit held that Mr. Peffer’s alleged use of a computer during the commission of a crime was adequate probable cause to justify a search of his home and a seizure of the technological equipment inside.²⁴⁵ The Sixth Circuit’s holding in this case was simply the latest blow to constitutional rights that restrict the State from engaging in unprincipled searches.

The first issue with the court’s reasoning in *Peffer* is that the majority treated the Peffers’ two probable cause arguments separately. The Peffers first argued that Sergeant Stephens’s affidavit failed to prop-

238. *Peffer*, 880 F.3d at 273.

239. *Id.*

240. *Id.*

241. *Id.*

242. *Id.*

243. *Id.* at 262.

244. *See supra* Part II.

245. *Peffer*, 880 F.3d at 256, 270.

erly allege that a crime had been committed.²⁴⁶ Secondly, the Peffers argued that the affidavit did not establish that evidence of the alleged crime would be found at their residence.²⁴⁷ In the Sixth Circuit's own words, "the court should consider whether the totality of the circumstances supports a finding of probable cause"²⁴⁸ However, instead of treating the Peffers' arguments as a totality, the court opted to analyze them one by one. First, on qualified-immunity grounds, the court decided not to address whether there was a Fourth Amendment violation regarding the affidavit failing to "properly allege that a crime had been committed."²⁴⁹ In a completely separate analysis, the court held that there was a proper nexus between the alleged crime and the Peffer residence to support a finding of probable cause.²⁵⁰

Treating these arguments separately is faulty. The overall question is whether evidence of a crime is likely to be found in the place to be searched.²⁵¹ If it is not clear that the alleged conduct is a crime, then that fact would certainly discount the odds that there would be evidence of a crime in the place to be searched. Treating the two arguments separately, rather than as a totality, leads to a tenuous finding of probable cause. If the court had treated the circumstances in *Peffer* as a totality, as Sixth Circuit precedent mandates, perhaps a different conclusion would have been reached. The Sixth Circuit should have undertaken "a 'practical, common sense' evaluation of 'all of the circumstances set forth in the affidavit'"²⁵²

Next, the court incorrectly shifted the burden when analyzing whether there was a Fourth Amendment violation regarding Sergeant Stephens's affidavit failing to properly allege that a crime had been committed. Probable cause requires a finding that "a reasonably prudent person would be warranted in believing that an offense had been committed"²⁵³ Thus, it follows that the officer preparing the affidavit in support of probable cause has the burden of producing articulable facts that suggest that a crime has been committed. The Sixth Circuit, however, completely ignored this burden.

Instead of requiring Sergeant Stephens's affidavit to produce enough facts to show that a crime had likely been committed, the Sixth Circuit held that "it was not clearly established that Mr. Peffer's actions as alleged in the affidavit *did not* violate" Michigan state law, and therefore there was no constitutional violation.²⁵⁴ The court's rea-

246. *See id.* at 264.

247. *Id.* at 264, 266.

248. *United States v. Woosley*, 361 F.3d 924, 926 (6th Cir. 2004) (citation omitted).

249. *Peffer*, 880 F.3d at 264.

250. *Id.* at 266–73.

251. *Id.* at 264 (quoting *Greene v. Reeves*, 80 F.3d 1101, 1106 (6th Cir. 1996)).

252. *See United States v. Williams*, 544 F.3d 683, 686 (6th Cir. 2008) (quoting *United States v. Laughton*, 409 F.3d 744, 747 (6th Cir. 2005)).

253. *Peffer*, 880 F.3d at 263 (quoting *Greene*, 80 F.3d at 1106).

254. *Id.* at 265.

soning here was an obvious attempt to shift the burden away from those who sought to enter a private residence. If the home is considered “sacred,”²⁵⁵ there should have been no burden on Mr. Pepper to establish that his actions *did not* violate Michigan state law.²⁵⁶ Requiring him to do so directly contradicts the presumption of innocence.

Not only did Sergeant Stephens’s affidavit fail to establish that a crime had likely been committed, it failed to establish that Mr. Pepper even owned a computer or any other type of technological equipment.²⁵⁷ Sergeant Stephens’s affidavit provided no “particularized facts demonstrating ‘a fair probability that evidence of a crime will be located on the premises of the proposed search.’”²⁵⁸ Rather than focusing on whether the mailings were connected to technological equipment that would likely be found inside the Pepper residence, the Sixth Circuit’s reasoning focused too heavily on whether Mr. Pepper was connected to the mailings themselves.²⁵⁹

In order to support a finding of probable cause, “the affidavit must suggest ‘that there is reasonable cause to believe that the specific “things” to be searched for and seized are located on the property to which entry is sought’ and not merely ‘that the owner of property is suspected of crime.’”²⁶⁰ On this issue, the court completely skipped a step in its analysis. It follows that the first step should have been to determine whether there was any reason to believe that Mr. Pepper owned the necessary technological equipment to commit the alleged crime. Only after establishing that first criterion should the court have moved into its analysis of whether such technological equipment would likely be found in the Pepper residence.

In *United States v. Griffith*, the D.C. Circuit faced a similar issue and performed the analysis correctly.²⁶¹ In *Griffith*, the D.C. Circuit held that an affidavit failed to establish probable cause to search a residence for a cellphone because “the affidavit . . . conveyed no reason to think that [the defendant], in particular, owned a cell phone.”²⁶² The D.C. Circuit reached this conclusion because “[t]here was no observation of [the defendant] using a cell phone, no information about anyone having received a cell phone call or text message from him, no record of officers recovering any cell phone in his possession at the

255. *Florida v. Jardines*, 569 U.S. 1, 8 (2013).

256. *Peffer*, 880 F.3d at 265.

257. *Id.* at 269.

258. *United States v. McPhearson*, 469 F.3d 518, 524 (6th Cir. 2006) (quoting *United States v. Frazier*, 423 F.3d 526, 531 (6th Cir. 2005)).

259. *See Peffer*, 880 F.3d at 266.

260. *McPhearson*, 469 F.3d at 524 (quoting *Zurcher v. Stanford Daily*, 436 U.S. 547, 556 (1978)).

261. *See United States v. Griffith*, 867 F.3d 1265, 1272 (D.C. Cir. 2017).

262. *Id.*

time of his previous arrest . . . and no indication otherwise of his ownership of a cell phone at any time.”²⁶³

The D.C. Circuit in *Griffith* reached its conclusion even after acknowledging the fact that “most people today own a cell phone.”²⁶⁴ This case is clearly extremely analogous to the facts in *Peffer*, and the Sixth Circuit should have paid closer attention to the D.C. Circuit’s rationale when conducting its analysis. But instead, the Sixth Circuit completely skipped the first step. The Sixth Circuit moved straight into its analysis of whether there is a presumption that computers are kept in the residence without first establishing that Mr. Peffer even owned a computer.²⁶⁵

To support the presumption that a nexus existed between computers and the residence, the Sixth Circuit attempted to analogize with cases involving the use of a firearm.²⁶⁶ The court asserted that guns and computers “are both personal possessions often kept in their owner’s residence and therefore subject to the presumption that a nexus exists between an object used in a crime and the suspect’s current residence.”²⁶⁷ The court admitted, however, that “[c]omputers are dissimilar to guns in many ways”²⁶⁸ But guns and computers are so dissimilar that it renders this analogy completely unworkable.

In a world of global networks and people using multiple electronic devices in many different places to perform many tasks, it is nearly impossible to generalize where computer-stored evidence is likely to be found. Unlike firearms, people in the modern era are continuously using technology even when they step out of their front door, whether it is through the use of cell phone technology, automobile technology, or public means of information.²⁶⁹ It would be absurd to generalize that most people keep their means of technology in their residence when modern use of technology is not even slightly limited to the interior of a building.²⁷⁰ In the modern era, most people in the United States own some form of technology.²⁷¹ The court’s reasoning in *Peffer* allows the police to create some tenuous theory as to how a person’s technology factored into some suspected crime, and therefore use that theory to enter the person’s home.

263. *Id.*

264. *Id.*

265. *See Peffer*, 880 F.3d at 270.

266. *See id.* at 271–72.

267. *Id.* at 272.

268. *Id.*

269. *See Internet Stats & Facts for 2019*, HOSTING FACTS (Dec. 17, 2018), <https://hostingfacts.com/internet-facts-stats/> [https://perma.cc/LHB6-6X7A].

270. *See id.*

271. *See J. Clement, Internet Usage in the United States – Statistics & Facts*, STATISTA (Aug. 20, 2019), <https://www.statista.com/topics/2237/internet-usage-in-the-united-states/> [https://perma.cc/K7B7-6232].

The court should have more closely followed its reasoning in cases involving drug distribution.²⁷² The Sixth Circuit had previously held that “if the affidavit fails to include facts that directly connect the residence with the suspected drug dealing activity, or the evidence of this connection is unreliable, it cannot be inferred that drugs will be found in the defendant’s home”²⁷³ The affidavit in *Peffer* completely failed to include facts that directly connected the residence with a computer.²⁷⁴ Like in cases involving drug distribution, and unlike cases involving firearms, it is difficult to generalize where the incriminating evidence will be found.

To make the court’s analysis even worse, the Sixth Circuit adopted the presumption that a nexus exists between computers and the residence by citing to three cases involving child pornography that are completely dissimilar to the facts of *Peffer*.²⁷⁵ The first case found that an “affidavit established nexus because [it alleged that] the suspect’s residence had high-speed internet and the suspect had been observed using a laptop on his front porch.”²⁷⁶ The second case found that an “affidavit established nexus because [it alleged that] the IP address used to distribute prohibited material was accessed by a residential modem located in the general vicinity of [the] suspect’s residence”²⁷⁷ Finally, the third case found that an affidavit established nexus because it established that the “suspect had a computer at his residence and had sent an email containing prohibited material”²⁷⁸

It is not difficult to see how these three cases have absolutely no relation to the facts in *Peffer*. Sergeant Stephens’s affidavit provided no evidence that the *Peffer* residence was equipped with high-speed internet.²⁷⁹ There was no observation of Mr. *Peffer* ever using a computer.²⁸⁰ There was no evidence that a residential modem existed next to the *Peffer* residence.²⁸¹ There was no evidence that Mr. *Peffer* had a computer in his residence.²⁸² There was not even any evidence that Mr. *Peffer* owned a computer whatsoever.²⁸³ The Sixth Circuit’s reasoning here was simply based on a sloppy non-sequitur fallacy that “because the affidavit reported that the letters and fliers appeared to be computer-generated, . . . evidence of those documents was likely to

272. See *Peffer*, 880 F.3d at 272–73.

273. *Id.* at 273 (quoting *United States v. Brown*, 828 F.3d 375, 383–84 (6th Cir. 2016)).

274. See *id.* at 269.

275. See *id.* at 272.

276. *Id.* (citing *United States v. Elbe*, 774 F.3d 885, 890 (6th Cir. 2014)).

277. *Id.* (citing *United States v. Lapsins*, 570 F.3d 758, 766 (6th Cir. 2009)).

278. *Id.* at 272 (citing *United States v. Terry*, 522 F.3d 645, 648 (6th Cir. 2008)).

279. *Id.* at 273.

280. *Id.*

281. *Id.*

282. *Id.*

283. *Id.*

be found on an electronic storage device, which . . . would likely be kept at its owner's residence."²⁸⁴ The cases that the Sixth Circuit cites did an extremely poor job at remedying its formal fallacy.

Ultimately, Sergeant Stephens's argument in support of probable cause was nothing more than a combination of subjective, good faith hunches that (1) Mr. Peffer owned a computer, and (2) evidence of the alleged crime would be found at his residence. Sergeant Stephens's affidavit fell short of providing articulable facts to support these hunches. The belief that the evidence sought will be found at the location to be searched must be supported by "more than mere suspicion."²⁸⁵ Further, "simple 'good faith on the part of the arresting officer is not enough.'"²⁸⁶ The outcome in *Peffer* is exactly what the Supreme Court aimed to prevent.²⁸⁷ Mr. Peffer's Fourth Amendment protections evaporated, and he was only "'secure in [his] person[] and house[], papers and effects'" at the discretion of the police.²⁸⁸

B. *Breadth of the Holding*

The largest controversy surrounding the *Peffer* case is the court's willingness to implement a legal presumption that evidence of technology is likely to be found at the defendant's residence.²⁸⁹ The search warrant in *Peffer* authorized the police to search for and seize a very broad category of computer-related evidence.²⁹⁰ When inferring a nexus between evidence and a suspect's residence, magistrates must consider "the type of crime being investigated [and] the nature of things to be seized"²⁹¹ An honest consideration of the nature of computer-generated evidence shows why the breadth of the *Peffer* holding was much too broad.

With over 312 million internet users as of 2018, the United States is one of the largest online markets worldwide.²⁹² About 87.27% of the United States population accessed the internet as of 2017.²⁹³ The num-

284. *Id.* at 269.

285. *United States v. Williams*, 544 F.3d 683, 686 (6th Cir. 2008) (quoting *United States v. Bethal*, 245 F. App'x 460, 464 (6th Cir. 2007)).

286. *Terry v. Ohio*, 392 U.S. 1, 22 (1968) (explaining that the Court refuses to sanction "intrusions upon constitutionally guaranteed rights based on nothing more substantial than inarticulate hunches") (citation omitted).

287. *See id.*

288. *See id.* (quoting *Beck v. Ohio*, 379 U.S. 89, 97 (1964)).

289. *See Peffer*, 880 F.3d at 270–71.

290. *See id.* at 261–62.

291. *United States v. Williams*, 544 F.3d 683, 687 (6th Cir. 2008) (quoting *United States v. Savoca*, 761 F.2d 292, 298 (6th Cir. 1985)).

292. Clement, *supra* note 271.

293. J. Clement, *United States Internet Penetration 2000-2017*, STATISTA (Aug. 19, 2019), <https://www.statista.com/statistics/209117/us-internet-penetration/> [<https://perma.cc/7RCD-XBQW>].

ber of internet users is growing by the second.²⁹⁴ People access the internet through smartphones, tablets, automobiles, and even commercial airlines. Mobile internet traffic accounts for the majority of all internet traffic.²⁹⁵ When considering the nature of modern technology, it becomes clear why a presumption that technological evidence is likely to be found inside the residence is misguided. Technology in the modern era is in no way limited to the interior of the home. The court in *Peffer* painted with too broad of a brush by implementing a legal presumption that evidence of technology is likely to be found at a defendant's residence. It is nonsensical to establish a rebuttable nexus between technology and the home when the majority of internet usage occurs *outside* the home.²⁹⁶

A major consideration when inferring a nexus between evidence and a suspect's residence is the likelihood that the evidence will be found outside the home.²⁹⁷ The affidavit in *Peffer* provided no facts that would lead to a conclusion that Mr. Peffer owned computer technology or that technological evidence would be found in his residence.²⁹⁸ If we consider the substantial presence of mobile technology in the modern era, the more accurate presumption in the *Peffer* case would have been that evidence of Mr. Peffer's crimes would likely be found somewhere *other* than in his home, unless the affidavit provided articulable facts to suggest otherwise. The court's presumption that a nexus existed between computer evidence and the Peffer residence failed to consider the reality of modern technology use.

The Sixth Circuit essentially relied on the outdated proposition that it was reasonable to assume that criminal defendants keep their possessions where they reside, unless the presumption is rebutted.²⁹⁹ While this presumption may be accurate in other cases, it is completely inapplicable to cases involving the use of computer technology. The onus should not be on the millions of technology users to prove why evidence of technology is not likely to be found in their residence. The data already suggests otherwise,³⁰⁰ the Sixth Circuit simply ignored it. There should be no such presumption. The officer providing the affidavit in support of probable cause should have the burden of

294. *Internet Users*, INTERNET LIVE STATS., <http://www.internetlivestats.com/internet-users/> (last visited Jan. 19, 2020) [<https://perma.cc/CXF9-VPUB>].

295. J. Clement, *Share of Global Mobile Website Traffic 2015-2019*, STATISTA (Dec. 3, 2019), <https://www.statista.com/statistics/277125/share-of-website-traffic-coming-from-mobile-devices/> [<https://perma.cc/PWX2-RLF4>].

296. *See id.* (demonstrating that mobile internet traffic accounts for the majority of all internet traffic).

297. *See* *United States v. Williams*, 544 F.3d 683, 687 (6th Cir. 2008) (explaining that magistrates must consider the extent of an opportunity to conceal the evidence elsewhere and the normal inferences that may be drawn as to likely hiding places).

298. *See Peffer*, 880 F.3d at 269.

299. *Id.* at 270.

300. *See* Clement, *supra* note 295.

producing articulable facts to suggest why computer-generated evidence is linked to a criminal defendant's residence.

Technological advancement is growing exponentially.³⁰¹ In the 21st century and beyond, technology inside a person's home is likely to contain digital evidence of a large portion of an individual's life. The holding in *Peffer* ultimately leads to a result where, as technology advances, it becomes easier for the State to justify entering the home. Further, it is likely difficult to curtail a search for a specific amount of technological data without also exposing much more of an individual's technological information. In other words, it is hard to limit the scope of searches that are based on obtaining technological information within the household. With all of these considerations in mind, it is difficult to justify the breadth of the *Peffer* holding.

C. *Public, Economic, and Technological Policy*

The holding in *Peffer* creates negative incentives in direct disregard of sound public, economic, and technological policy. Mobile use of technology dominates the majority of technology use.³⁰² If the home is truly "sacred"³⁰³ under the Fourth Amendment, then the home should be excluded from general presumptions about where technological evidence is likely to be found. Additionally, the economic costs of conducting a Fourth Amendment search are not generally "borne by the police."³⁰⁴ Rather, the public body that endures the searches and seizures incurs the costs.³⁰⁵ As a result, the police have an incentive to engage in more invasive searches unless Fourth Amendment law requires the State to account for the economic costs.³⁰⁶ Law should incentivize technological growth and economically efficient searches rather than punish it.

Under the *Peffer* standard, as technology advances, probable cause of criminal misconduct inside a person's residence becomes much easier for the government to obtain. Technological growth will soon lead to a society where the vast majority of information regarding a person's life and activities will be stored electronically. In order to promote technological advancement and to prevent unreasonable invasions of privacy, Fourth Amendment law should require more than the simple use of electronic technology to justify a search of a suspect's residence.

301. *Big Idea: Technology Grows Exponentially*, BIG THINK (Mar. 21, 2011), <https://bigthink.com/think-tank/big-idea-technology-grows-exponentially> [https://perma.cc/Q53F-DU9T].

302. See Clement, *supra* note 295.

303. See *Segura v. United States*, 468 U.S. 796, 810 (1984).

304. See Orin S. Kerr, *An Economic Understanding of Search and Seizure Law*, 164 U. PA. L. REV. 591, 598 (2016).

305. See *id.*

306. See *id.*

With the exponential growth of technology,³⁰⁷ it becomes more likely that an individual's technological equipment will contain digital evidence of alleged crimes. By using technology's inevitable grasp over modern life, as technology advances, the *Peffer* holding allows the State to circumvent the constitutional requirement of a "particular[]" description of "the place to be searched, and the persons or things to be seized."³⁰⁸ Further, if the simple use of technology is enough to justify breaking down the front door, a negative economic incentive is created against the use and advancement of technology. In a globalizing world-economy, differences in technological advancement between countries explain their differences in economic growth and income inequality.³⁰⁹ Thus, in order for the United States to maintain its status as a leader in the online market,³¹⁰ a stricter interpretation of the Fourth Amendment's probable cause requirement is necessary.

V. CONCLUSION: HOW SEARCH AND SEIZURE LAW SHOULD MOVE FORWARD

In October 2018, the Supreme Court of the United States denied certiorari of the *Peffer* case.³¹¹ But as technology continues its exponential growth, courts in the United States will soon be faced with many cases involving issues similar to those in *Peffer v. Stephens*. *Peffer* is simply the first example in the inevitably large number of cases that will hinge on the constitutionality of searching a criminal defendant's home based on the use of electronic technology. Ultimately, the Supreme Court will likely need to grant review of another Fourth Amendment case in order to clarify exactly what the Fourth Amendment requires when searching a suspect's home based on the use of technology.

Until then, it would not be surprising to see circuit courts limit the *Peffer* rationale to its facts. The likelihood that using a computer to commit a crime means that evidence of the crime will be found within the suspect's residence seems too fact-dependent to justify such a broad presumption. After all, the nature of the probable cause question is inherently fact-dependent.

Should the Supreme Court grant review of a Fourth Amendment case to solve the *Peffer* issue, the Court should heavily consider Judge

307. See *Big Idea: Technology Grows Exponentially*, BIG THINK (Mar. 21, 2011), <https://bigthink.com/think-tank/big-idea-technology-grows-exponentially> [https://perma.cc/Q53F-DU9T].

308. U.S. CONST. amend. IV.

309. Hulya Kesici Caliskan, *Technological Change and Economic Growth*, 195 SOC. & BEHAV. SCI. 649, 649 (2015).

310. See Clement, *supra* note 271.

311. *Peffer v. Stephens*, 139 S. Ct. 108, 108 (2018).

Sri Srinivasan's rationale in *United States v. Griffith*.³¹² Although the *Griffith* holding does not directly contradict the *Peffer* rationale, the *Griffith* court showed much more skepticism about presuming that evidence of electronic technology is inherently linked to a suspect's residence.³¹³ At the very least, the court in *Griffith* required the officer's affidavit to articulate a reason to believe that the suspect owned the technology in question.³¹⁴

Ultimately, the Supreme Court should do away with any broad presumptions about where evidence of criminal misconduct will be found, especially in cases involving the use of technology. Second, the Supreme Court should clarify that the overriding burden of producing facts in support of probable cause rests with the State, rather than requiring anything from the criminal suspect. If the State's burden is not met, the front door should not open. Third, in cases involving the use of technology, the Supreme Court should require affidavits to allege articulable facts that lead to a conclusion that the criminal defendant actually owns the technology in question. If the Supreme Court implements such a rule, it would be a sound decision in favor of technological innovation, economic policy, and civil liberties.

312. *See* *United States v. Griffith*, 867 F.3d 1265, 1271–72 (D.C. Cir. 2017).

313. *See id.*

314. *See id.* at 1272.